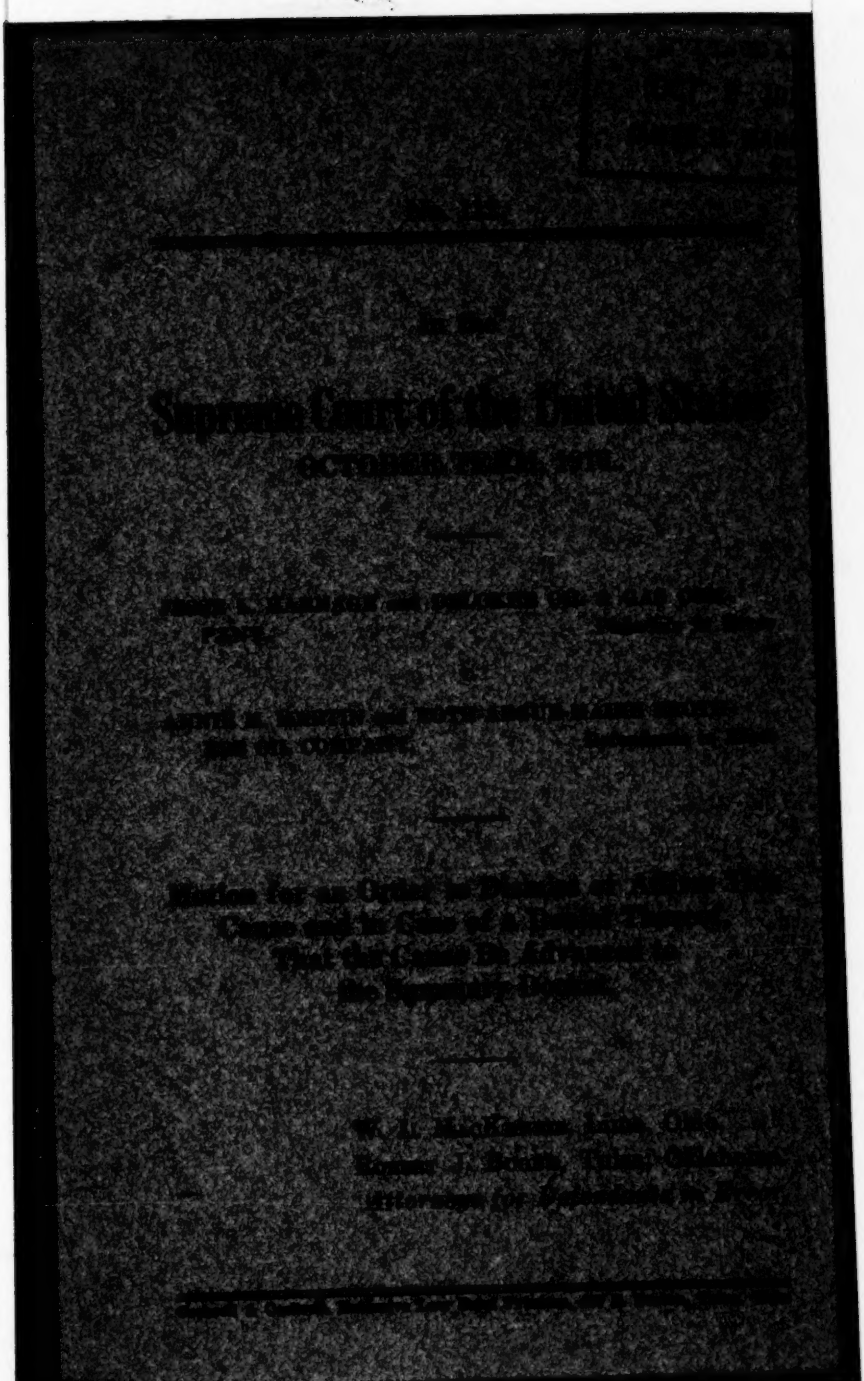

In the

Supreme Court of the United States

OCTOBER TERM, 1916..

No. 112.

JESSE L. HARNAGE and DELOKEE OIL & GAS COMPANY, - - - - - - - Plaintiffs in Error

v.

ANNIE M. MARTIN and ROTH-ARGUE-MAIRE BROTHERS OIL COMPANY, - - - Defendants in Error

---

Motion for an Order to Dismiss or Affirm This Cause and in Case of a Denial Thereof, That the Cause Be Advanced to the Summary Docket.

Now comes Annie M. Martin and the Roth-Argue Maire Brothers Oil Company, the defendants in

error, by W. L. MacKenzie and Robert J. Boone, their attorneys, and move this Court to dismiss the writ of error issued upon the petition of Jesse L. Harnage and the Delokee Oil & Gas Company, the above named plaintiffs in error, to the Supreme Court of Oklahoma upon a final judgment entered in said Supreme Court of the State of Oklahoma in favor of the defendants in error and against said plaintiffs in error; and in default of dismissing said writ of error, that then in that event, this Court affirm the judgment of the said Supreme Court of Oklahoma; and for cause and grounds of this motion to dismiss or affirm, the defendants in error say:

I.

That this Honorable Court is without jurisdiction to review on writ of error the said judgment of the Supreme Court of the State of Oklahoma for the reasons:

(a) That the Supreme Court of Oklahoma was without jurisdiction to grant the writ of error or to transmit or cause to be transmitted the record herein, it having lost jurisdiction of the parties and subject matter when the mandate of the said Supreme Court of the State of Oklahoma was issued to the District Court of Washington County, Oklahoma, and filed in said Court on the 26th day of December, 1913.

(b) That there is no Federal question involved herein.

II.

In the event that this Honorable Court should refuse to grant the foreging motion to dismiss said writ of error and should maintain jurisdiction upon the same, then mover prays that said judgment of the Supreme Court of Oklahoma be affirmed, as it is manifest that said writ of error was taken by plaintiffs in error for delay only, and that the questions upon which the decision of said cause depend are so frivolous as not to need further argument.

III.

In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss or affirm, then mover prays that the order of supersedeas be vacated and this cause be transferred for hearing to the summary docket. Mover avers that notice of intention to present this motion was given to, and a copy of brief filed in support of same, was served upon the plaintiffs in error, and that proof thereof accompanies this motion.

WHEREFORE, Mover prays that said writ of error taken by Jesse L. Harnage and the Delokee Oil & Gas Company be dismissed and in the alternative that the judgment of the Supreme Court of Oklahoma be affirmed, and in the event of the denial of

said motion, that the order of supersedeas be vacated and that this cause be transferred for hearing to the summary docket. And mover shall ever pray.

W. L. MacKenzie,
Robert J. Boone,
Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

Jesse L. Harnage and Delokee Oil & Gas Company, Plaintiffs in Error v. *Annie M. Martin and Roth-Argue-Maire Brothers Oil Company, Defendants in Error.*

No. 112.

NOTICE OF MOTION.

To James A. Veasey, L. A. Rowland and J. P. O'Meara, attorneys for the above named plaintiffs in error, Tulsa, Oklahoma;

Please take notice that the foregoing and attached motion will be presented to the said Honorable Supreme Court of the United States at Washington, D. C., on Monday, the 9th day of October, A. D. 1916.

W. L. MACKENZIE,
ROBERT J. BOONE,
Attorneys for Defendants in Error.
Tulsa, Oklahoma.

Due service is hereby admitted at Tulsa, Oklahoma this the_____day of September, 1916, of the foregoing notice of motion, motion and brief attached thereto.

Attorneys for Plaintiffs in Error

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

Jesse L. Harnage and Delokee Oil & Gas Company, Plaintiffs in Error v. Annie M. Martin and Roth-Argue-Maire Brothers Oil Company, Defendants in Error.

No. 112.

BRIEF OF DEFENDANT IN ERROR.

The question set out by paragraph (a) of the first ground of the motion relates solely to the question of whether or not this Court can acquire jurisdiction upon a writ of error issued and allowed by the Supreme Court of the State of Oklahoma after said Supreme Court of Oklahoma has transmitted its mandate and the same has been filed in the trial court. There is offered in evidence in support of this ground of the motion a certified copy of the mandate with its endorsement from the District Court of Washington County, Oklahoma. The judgment was rendered by the Supreme Court of Oklahoma on the 28th of October, 1913, and the mandate was filed in the District Court in Washington County on the 26th day of December, 1913. The petition of plaintiffs in error for a writ of error upon said judgment was filed in this Court on April 19, 1915, a period of more than sixty days, excluding Sundays, after the rendition of the judgment.

Rules Number 10 and 11 of the Supreme Court of Oklahoma provide as follows:

> "X. REHEARING: STAY OF MANDATE. After the expiration of fifteen days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered, in accordance with the decision of this Court, and no petition for rehearing shall stay such mandate unless the person applying for rehearing shall present such petition to and obtain from one of the justices who concurred in the opinion a stay of such mandate until said petition for rehearing shall be heard. The justice to whom such petition is presented shall examine the same, and if in his opinion a rehearing will probably be granted, he may take an order staying such mandate.
>
> In any case in which a petition for rehearing is denied or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed, and the clerk shall not file any such motions or applications, except by leave of court first obtained."
>
> "XI. PROCEDURE UPON AFFIRMATION: Upon the affirming of a judgment, execution may issue, at the option of the party, from this court; or, if such party elects, a writ of procedure shall be issued to the court below upon the payment by the successful party of the costs incurred in this court."

It will, therefore, be noted from the above rules that after the expiration of fifteen days from the

filing of an opinion in a cause the clerk of the State Supreme Court is required to issue his mandate to the lower court to proceed in accordance with the opinion and decision of the Court. The Supreme Court of Oklahoma in construing its right to recall its mandate or to exercise jurisdiction over a case after the mandate has been transmitted to the trial court and spread of record, in the case of *Thomas* v. *Thomas,* 113 Pac. Rep. 1058, says:

> "Where, after a decision of a case, and rendition of an opinion in this Court, its mandate is regularly transmitted to the trial court, and is spread of record upon its records, this Court, in the absence of fraud, accident, inadventance or mistake, is without jurisdiction to recall the mandate and entertain a petition for rehearing, and a motion for leave to file the same will be denied."

This Court in the case of *Polleys* v. *Black River Improvement Company,* 113 U. S. 81, 28 Law Ed. 938, held that—

> "• • • where on an appeal, the Supreme Court of a state reversed a judgment of an inferior court and remanded the cause to that court, with directions to enter judgment, the writ of error from this court was properly directed to the inferior state court to bring the record here for review."

We, therefore, contend that the writ of error

in this case should have been directed to the District Court in Washington County, Oklahoma, and that although the Supreme Court attempted to transmit a record, such purported record would not give this court jurisdiction.

Under subdivision (b), that there was no Federal question involved in the trial in the lower court, we call attention to the opinion of the court below, which is printed in full as an appendix to this brief.

At the time of the preparation of this motion, the record in this case has not been printed, and therefore we are unable to refer to the same, or to know what the assignments of error in the petition of the plaintiffs in error for its writ of error, but we assume that the petition probably alleges such assignments as might constitute a Federal question, but an examination of the opinion of the court below, and also an examination of the opinion of the court below, and also an examination of the record itself will show, as we take it, conclusively that there was no Federal question involved. The case was decided solely upon the question of the sufficiency of plaintiffs' in error evidence, because the District Court sustained defendants' demurrer to the evidence. Quoting from the body of the opinion of the court below:

> "After a careful review of the evidence before the Secretary of the Interior, we are

of the opinion that it is sufficient to establish that defendant had such an interest in the improvements upon the land in controversy as entitled her, under the provisions of the statute above referred to, to select these lands as her allotment. Plaintiff does not claim that he ever acquired this right from her, or that she ever conveyed it to others.

Other questions are presented by this appeal; but, since our views upon this one question requires an affirmance of the judgment of the lower court, it is unnecessary to consider them."

As will be noted, there was only one question tried and determined by the trial court, and that was the *sufficiency of the evidence* to sustain the plaintiffs' case; the same question again arose in the Supreme Court of Oklahoma, and that Court upheld the decision of the trial court, and its decision no where involved any Federal question, but related solely to the sufficiency of the evidence before the Court to sustain the plaintiffs' cause of action.

It is fundamental that the Federal question must be real, not fictitious; that is, there must be some ground for the averment of the question.

Hamblin v. *Western Land Company*, 147 U. S. 531, 37 Law Ed. 267.

In the early case of *Murdock* v. *Memphis*, 20

Wallace 635, 22 Law Ed. 429, Justice MILLER says in the opinion:

> *First:* "That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the Act must have been raised and presented to the state court.
>
> *Second:* That it must have been decided by the state court, or that its decision was necessary to the judgment or decree, rendered in the case.
>
> *Third:* That the decision must have been against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws or authority of the United States.
>
> *Fourth:* If it finds that it was rightly decided, the judgment must be affirmed.
>
> *Fifth:* If it was erroneously decided against a plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the state court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed inquiring into the soundness of the decisions on such other matters or issue."

It will be further noted that it is only in cases where the state court's decisions were adverse to the power exercised by the United States that a

review by this court is provided for in the Act; in the case at bar, the decisions have not been adverse to the power exercised by the United States, but from an examination of the record it will be found that the defendants in error have been sustained by every decision from that of the Superintendent of the Five Civilized Tribes to the Commissioner of Indian Affairs and also the decision of the Honorable Secretary of the Interior, awarding the patent to the lands in controversy to the defendant in error, Annie M. Martin; in other words, each decision of each of the various officers of the Interior Department handling the Indian affairs have at all times been in favor of Annie M. Martin. We contend that this court has nothing to do with the facts—that is all there is in dispute, as I view it.

It seems to be elementary:

> "That questions of fact cannot be reviewed by the Supreme Court, but must be taken as found."
>
> *Hedrick* v. *Atchison, etc., R. Co.* 167 U. S. 673, 42 Law Ed. 320.
>
> Montgomery's Manual of Federal Procedure, page 215.

There being only a question of fact that was tried and determined in the courts below, we do not see how it is possible for counsel by any ingenuity to construe the decisions of the lower court

as being a decision wherein a Federal question was necessarily involved; besides that, the rule is that the questions must be raised in the state court; some of the authorities say:

> "The proper time to present the question is in the trial court, whenever that is required by state practice in accordance with which the highest court will not revise the judgment of the court below on questions not therein raised. And if it is not presented before decision by the court of last resort, in the state, it then becomes too late to present it. It is not sufficient, therefore, to make the claim for the first time in the petition for writ of error."
>
> Montgomery's Manual Federal Procedure, pages 211 to 212.

It seems so manifest from the question determined by the decisions of the court that the writ of error in this cause was taken by the plaintiffs in error for delay only, and that the question upon which such decisions of said cause depend, are so frivolous as not to need further argument.

We, therefore, respectfully submit and request that the writ of error be dismissed and if not that, then that the judgment must be affirmed, and failing therein, we move that the supersedeas be vacated and the cause be advanced to the summary docket for an early hearing.

W. L. MacKenzie, Lima, Ohio,
Robert J. Boone, Tulsa, Oklahoma.
Attorneys for Defendants in Error.

APPENDIX.

(Filed Oct. 28, 1913.) 40 Okla. 341, 136 Pac. 154.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

Jesse L Harnage and Delokee Gas & Oil Company. Plaintiffs in Error, vs. Annie M. Martin and the Roth-Argue-Maire Brothers Oil Co., Defendants in Error.

No. 4284.

SYLLABUS.

1. Courts of equity have jurisdiction, after the Commission to the Five Civilized Tribes and the Secretary of the Interior have exercised their powers and exhausted their jurisdiction, to determine whether by error of law, or through fraud or gross mistake of fact, the Commission or the Secretary has failed to allot land in the Cherokee Nation to the citizen, who, under the law and the treaties, was entitled to the same.

2. Whether or not there was any evidence to sustain a finding of fact made in a contest before the Commission and the Secretary of the Interior, involving the rights of two different Indians to select certain lands, is a question of law; and an error in that respect which results in the issuance of a patent to the wrong party may be remedied by a proceeding in equity.

3. The evidence reviewed and held sufficient to sustain the finding of fact made by the Secretary of the Interior and the Commission in a contest before them.

ERROR FROM THE DISTRICT COURT OF WASHINGTON COUNTY.

R. H. Hudson, Trial Judge.

AFFIRMED.

Veasey, O'Meara & Owen, Attorneys for Plaintiffs in Error.
Robert J. Boone, Attorney for Defendants in Error.

OPINION OF THE COURT BY HAYES, C. J.

This is an appeal from a judgment of the District Court of Washington County, sustaining a demurrer to the evidence of the plaintiffs in error, plaintiffs below, and dismissing their petition and rendering a judgment against them in favor of defendants in error, defendants below.

Plaintiff, Harnage, and defendant, Martin, are duly enrolled members of the Cherokee Tribe of Indians, and this suit was brought by Harnage in the court below to charge the lands in controversy with a trust in his favor for the alleged reason that in a contest case before the Department of the Interior, involving the right to select said lands as an allotment, the Secretary of the Interior committed errors of fact and law, by reason whereof he awarded the lands in controversy to defendant Martin as a portion of the allotment to which she was entitled as a member of said tribe of Indians; when, under the facts established and the law applicable thereto, plaintiff contends such lands should have been awarded to him. Plaintiff, Delokee Gas & Oil Company, claims interest in said land by

virtue of an oil and gas lease from its co-plaintiff, Harnage. Defendant, Roth-Argue-Maire Brothers Oil Company claims a like interest under a similar lease from defendant Martin. It is therefore unnecessary to make further reference to the interests of thse two companies in the consideration of the case.

Plaintiff made a part of his petition and introduced at the trial all the records in a contest case, which was instituted and tried before the Department of the Interior for the purpose of determining whether he or defendant was entitled to select the land in controversy as an allotment. On the 13th day of May, 1904, plaintiff made application to the Commission to the Five Civilized Tribes to have allotted to him the land in controversy, and such application was granted. Thereafter, on the 26th day of May, 1904, defendant made a similar application to the Commission to the Five Civilized Tribes which was refused; whereupon, on the same day she instituted a contest proceeding before the Commission to the Five Civilized Tribes against the allotment theretofore made to defendant. The trial before the Commission to the Five Civilized Tribes resulted in a decision in favor of defendant in this case, plaintiff in the contest. From this decision an appeal was taken to the Commissioner of Indian Affairs, where a like decision and judgment was rendered, which, on appeal to the Secretary of the Interior, was affirmed. The trial court had before it the entire record and all the evidence upon which the decisions of the Commission to the Five Civilized Tribes and the Commissioner of Indian Affairs and the Secretary of the Interior were rendered; and in addition thereto, certain addition evidence in the form of depositions, which need not be noticed here.

Plaintiff urges that the action of the trial court in sustaining a demurrer to his evidence was erroneous, upon three different grounds, and for such reason should be reversed. Under the view we take of the case, it will be necessary to consider only the first proposition advanced by plaintiff, which is that since plaintiff made the first selection of the land in controversy as a part of his allotment and such fact appears without dispute in the record before the Secretary of the Interior and in the evidence before the trial court, and that there being no evidence whatever to the effect that at the time of the prior selection by plaintiff defendant was the owner of the improvements of the land in controversy, the court erred in not finding the issues for plaintiff. There is no contention that the decision of the Department of the Interior was fraudulently rendered, or that any fraud was exercised by defendant in procuring it. The power of the courts where the Department of the Interior has awarded to a member of the Five Civilized Tribes certain land as his allotment and patent therefor has been issued to him, to determine the rights of a contestant to such land was decided in Garrett v. Walcott, 25 Okla. 574, wherein, it was held that the jurisdiction of the Commissioner of Indian Affairs and of the Secretary of the Interior and the effect of their action on the allotment of the lands of such Indians are the same in effect as the jurisdiction and effect of the Land Department of the United States in the disposition of the public lands within its control. The

is accurately stated in Howe v. Parker (C. C. A.), 190 Fed. 738, in the following language:

> "The Land Department of the United States is a quasi judicial tribunal, invested with the authority to hear and determine claims to the public lands subject to its disposition and its decisions of the issues presented at such hearings are impervious to collateral attack. But its judgments and patents do not conclude the rights of claimants to the land. They rest on established principles of law and fixed rules of procedure, the application of which to each case conditions its right decision, and if the officers of the Land Department are induced to issue a patent to the wrong party by an erroneous view of the law or by a gross mistake of the facts proved, or by a decision induced by fraud, the rightful claimant is not remediless. He may in a court of equity avoid the effect of the decision and the patent and charge the legal title derived from it with a trust in his favor."

By section 11 of an act of Congress, approved July 1, 1902, (32 U. S. Stat. at L. p. 716), it is provided that there shall be allotted by the Commission of the Five Civilized Tribes to each enrolled member of the tribe lands equal in value to 110 acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which lands may be selected by each allottee so as to include his improvements. By section 18 of the same act it is made unlawful after 90 days after the ratification of the act for the member of the tribe to enclose or hold in his possession more land in value than 110 acres of the average allottable lands of the Cherokee Nation, either for himself or his wife, or for each of his minor children. These provisions of the act clearly contemplate that any member of the tribe shall have a right to select as his allotment lands upon which he owns the improvements, and that his wife and minor children shall have the right to select as their allotments lands upon which he owns the improvements; and that after 90 days after the ratification of the act, the fact that an Indian has theretofore owned the improvements and held possession of lands in acreage in excess of what he is entitled to take as allotment for himself, his wife and his minor children shall not preclude others from taking such lands as their allotment, because it is made unlawful for a member of the tribe, although he owns the improvements, to hold the lands, unless needed as allotment for himself, or his wife and minor children.

Plaintiff in the instant case filed first upon the lands in controversy. Defendant was entitled to prevail in the contest, only by showing that she had some preference right to select the lands in controversy as a portion of her allotment; that she was the owner of the improvements and entitled to the benefits of the provisions of section 11, securing her the right to select the lands whereon she owned the improvements as her allotment. It is the contention of plaintiff that there was not any evidence before the Department to establish this fact. Defendant's first contention is, that in the absence of fraud, the courts can not inquire as to whether there was any evidence to sup-

port the finding of fact of the Department upon which the contest case was determined. This contention, we think, is settled by decisions of this court, as well as by the decisions of the Federal courts. In Jordan v Smith, 12 Okla. 703, it is said:

> "So far as the courts are concerned the findings of fact by the land department in a contest proceeding are as conclusive and binding upon the courts as a verdict of a jury in their own tribunal, and the only inquiry the court can make is, was there any evidence on which to base the finding?"

See also, Paine v. Foster, 9 Okla. 213.

In Howe v. Parker, supra, Judge Sanborn, who delivered the opinion for the court, said:

> "Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it, is in his and in every judicial and quasi judicial tribunal, a question of law."

In support of this statement of the law numerous authorities are cited. If the Secretary of the Interior in rendering his decision assumed a fact established which was necessary to the rights of the Prevailing party, but which there was wanting any evidence to support, the error committed by him was one of law, and plaintiff may have it reviewed by a court of equity in a proceeding brought to avoid the effect of the decision of the Secretary of the Interior.

The facts found in the contest case by the Commission to the Five Civilized Tribes, by the Commissioner of Indian Affairs and by the Secretary of the Interior, although not stated by these respective officers in the same language, are substantially the same. The land in controversy constitutes part of a large tract known as the Thursday place and was held at the time of the institution of the contest case and had been for several years prior thereto by a family of which Mary Thursday, the grandmother of defendant, is the Indian head. The southern portion of the said place was held and occupied by this family for several years prior to 1893. Whether this portion of the place was originally acquired by the family through purchase or original segregation, the evidence is not clear. In 1893, Mary Thursday purchased the improvements upon the northern part of said place, which embraces the land in controversy. She paid therefor the sum of $800, which payment she made out of funds received by her as payments to her as a member of the Indian tribe, and to her grandson, Samuel Bob, the brother of defendant; and a bill of sale was executed by Mary Thursday and said Samuel Bob for said improvements. Both of defendant's parents died prior to 1890. Before their death, for a number of years, she and her parents resided with her grandmother, Mary Thursday. Subsequent to her parent's death, she continued to reside for a time with her grandmother. Samuel Bob,

defendant's brother, continued to reside at the same place until he became of age. Within a year or two after the death of her parents, defendant was stolen from her home with her grandmother by a man by the name of Frenchman, by whom she was kept and with whom she resided until she went away to school. In 1898, when she was about 18 years old, she married George Martin, her present husband, with whom she has since resided. Defendant's grandmother, during the time she lived with her, collected defendant's payments from the government to which defendant was entitled as a member of the Indian tribe, and which the grandmother collected as the Indian head of the family, of which defendant was then a member. During the foregoing mentioned time, one Wallace Thursday, the step-grandfather of defendant, resided at the home of Mary Thursday. In 1899, about a year after defendant's marriage, while she and her husband were visiting at the Thursday home, her grandmother told her that she need not look elsewhere for lands to allot; that there was sufficient in the home place for her; and that she could select her allotment out of the lands in that place; that the family would remain in possession of the same until time to make the allotment, but that there were sufficient lands there for the grandmother and defendant's brother, Samuel Bob, who had theretofore been a member of the family, and the defendant, and gave her the right to select her allotment out of said place.

The evidence establishes that conversations to the foregoing effect were had between the defendant, her husband, and the grandmother, or with the step-grandfather at different times. Prior to the time defendant filed her contest, Mary Thursday had selected her allotment in the southern part of the home place, and Samuel Bob had selected his in the northern part, and the land lying between these two allotments was left for defendant, which, when she made application to allot, she found to have already been allotted to plaintiff; and she thereupon instituted her contest. The evidence is conflicting relative to some of the facts stated above, but with the substantial conflict in the evidence, this court has nothing to do. It is true that the evidence does not disclose that there was ever any formal conveyance of the improvements upon the identical land in controversy made by Mary Thursday to defendant; but it is clear from the evidence that Mary Thursday intended, in consideration of the fact that she had collected and expended in establishing and maintaining the home, moneys to which defendant was entitled and received as a member of the Indian tribe, and out of affection and love she bore for the daughter of her deceased son, to provide for her an allotment, and that she gave to defendant the right to take her allotment out of said lands; and in giving her such right, gave her every interest therein necessary to effectuate the allotment, which included the improvements thereon. There was no law that required that such gifts or conveyances or improvements upon lands of the tribe held by an individual Indian before allotment should be made by written contract or conveyance. After a careful review of the evidence before the Secretary of the Interior, we are of the opinion that it is sufficient to establish that defendant had such an interest in the improvements upon the land in controversy as entitled her, under the provisions of the statute above referred

to, to select these lands as her allotment. Plaintiff does not claim that he ever acquired this right from her, or that she ever conveyed it to others.

Other questions are presented by this appeal; but, since our view upon this one question requires an affirmance of the judgment of the lower court, it is unnecessary to consider them.

The judgment of the trial court is affirmed.

All the Justices concur.